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Supreme Court of the United States.

OCTOBER TERM, 1904.

NO. 186.

IN THE MATTER

OF

MORRIS STRAUSS.

BRIEF FOR APPELLEE.

WM. TRAVERS JEROME,
District Attorney
of the County of New York.

HOWARD S. GANS,
Of Counsel.

New York.
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On a Certificate from the United States Circuit Court of Appeals, for the Second Circuit.

No. 186.

Preliminary Statement.

The appellant, who is the Relator upon whose petition a writ of *habeas corpus* has been sued out, is a fugitive from the justice of the State of Ohio, arrested in the State of New York, under the warrant of the Governor of that State issued pursuant to the demand of the Governor of Ohio.

After his arrest he sued out his writ in the District Court of the United States for the Southern District of New York, alleging that his detention was void and in contravention of the Constitution of the United States, because it did not appear by the papers accompanying the requisition of the Governor of Ohio that he had been "charged" with crime in that State within the meaning of the Constitution.

The defect urged was that the "charge" was founded not upon the indictment of a Grand Jury, but upon affidavits and other papers sworn to before a magistrate having jurisdiction to hold for the action of the Grand Jury.

The point urged is that proceedings for interstate rendition will lie only where an indictment has been found and the requisition is based upon the indictment, unless the demand be made by a State in which a trial may be had on the basis of the complaint before a magistrate without the intervention of a Grand Jury.

The contention, as was perhaps to be expected, has not met with favor in the courts below, but the Circuit Court of Appeals of the Second Circuit, after affirming the order of the District Court which dismissed the writ and remanded the prisoner has, in compliance with the mandatory provisions of the Act of Congress of March 3d, 1891, certified to this Court the constitutional question.

The Questions Certified.

First: Whether the delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretenses has been sworn to and is pending before a Justice of the Peace of Ohio having the jurisdiction conferred upon him by the laws of that State, is authorized in view of the provisions of Art. IV., Sec. 2, Subd. 2 of the Constitution.

Second: Is Sec. 5278 of the Revised Statutes in as far as it authorizes the delivery up of an alleged fugitive from justice upon an affi-

davit of complaint pending before a Justice of the Peace in Ohio for the crime of securing property by false pretenses, which said Justice of the Peace has the jurisdiction conferred upon him by the laws of the said State, violative of Art. IV., Sec. 2, Subd. 2 of the Constitution.

The Relator's Contention.

Briefly summarized the Relator's contention appears to be as follows:

(1) Interstate rendition is authorized solely by subd. 2 of Sec. 2 of Art. IV. of the Federal Constitution, which reads as follows:

> "A person charged, in any State, with treason, felony or other crime, who shall flee from "justice and be found in another State, shall, "on demand of the Executive authority of the "State from which he fled, be delivered up, to "be removed to the State having jurisdiction "of the crime."

(2) The Constitution thus requires that the fugitive shall be "charged" with crime in the demanding State.

(3) A person is charged with crime only when a criminal action against him has proceeded to the point of the accusation upon which he is to be tried.

(4) Therefore if he is to be tried upon an indictment, he is not charged with crime until the indictment has been found.

(5) That the provision of Section 5278 of the United States Revised Statutes authorizing the de-

livery up of the fugitive upon a charge contained in an affidavit made before a magistrate is unconstitutional, unless it be confined to those cases of minor crimes in which under the laws of many States the affidavit before the magistrate constitutes the pleading upon which the trial is had.

To us it appears that this contention, though dignified by the learning and ingenuity with which it has been presented, involves such manifest perversion of language and such manifest absurdity of result, as to make it unworthy of serious consideration.

Our answer to it is

First: That it involves results so absurd and so detrimental to the public interest as to make it impossible that it should be adopted even if the language of the Constitution were reasonably susceptible of such interpretation.

Second: That the Constitutional provision, whether interpreted upon the basis of its language alone, or construed in the light of its history and the conditions existing prior to and contemporaneous with its adoption, admits of no such limitation upon the power of the general government.

Third: That even if it be assumed that the contention of the Relator is sound, the limitation is upon the right of the general government to *compel* rendition, and not upon the right of the States *voluntarily to accord it*, and that therefore no Federal question is presented by this certification.

POINT I.

The construction for which the Relator contends, involves results so absurd and so detrimental to the public interest as to make it impossible that it should be adopted even if the words of the constitution were on their face reasonably susceptible of such interpretation.

It is of course unnecessary to multiply authorities to the effect that a reading of a statute or constitution which leads to absurd or noxious results will be rejected unless the plain language of the instrument leaves no room for escape from that construction.

Prigg v. Commonwealth, 16 Pet., 539, 612.
In re Chapman, 166 U. S., 661, 667.
Lau. Ore. Bear. v. U. S., 144 U. S., 47, 59.
Holy Trinity Church v. U. S., 143 U. S., 457, 461.
Jarrolt v. Moberly, 103 U. S., 580, 586.

Since, therefore, the language of the Constitution not only does *not* lead inevitably to the results contended for, but in fact requires the most strained and artificial perversion of plain words in order to arrive at that result, we have undertaken to point out first some of the invidious consequences which flow necessarily from the Relator's contention.

A.

THE LIMITATION SUGGESTED WOULD CREATE A CHAOTIC CONDITION IN THE LAW OF RENDITION, REQUIRING THE RENDITION TO ONE STATE FROM ANOTHER UNDER CONDITIONS IN WHICH THE ASYLUM STATE WOULD HAVE NO RECIPROCAL RIGHTS AS AGAINST THE DEMANDING STATE, AND IT WOULD FAVOR THOSE STATES WHICH AFFORD THE LEAST SAFEGUARDS TO THE ACCUSED AS AGAINST THOSE THAT AFFORD THE GREATER.

It is to be observed that the Relator does not contend that interstate rendition is limited *by the constitution* to the case where the prosecution has been instituted *by indictment*.

He recognizes, of course, that the Constitution imposed no limitation upon the States as to the method in which criminal actions should be commenced or criminal charges should be made. (Hurtado v. California, 110 U. S., 516.)

And he will concede of course that at the time of the adoption of the section here under construction, *i. e.,* prior to the incorporation in the Constitution of the first ten amendments, there was no limitation upon the right of the Federal Government itself to institute criminal proceedings or to provide for the preferment of criminal charges in any form which might seem wise to the Federal legislature.

And he concedes therefore that the provision here under consideration contains no inhibition which would have prevented the Congress from providing for interstate rendition to be based upon the "charge" of crime contained in an information

filed by the prosecuting officer, or in the affidavit of a private citizen, wherever under the laws of the demanding State such an information or affidavit constituted the pleading upon which the defendant was to be tried.

His contention is, therefore, that so far as the Constitution is concerned, the right to secure rendition is dependent solely upon the formalities provided for under the laws of the demanding State, and that the slighter the safeguard to the accused which those laws afford the greater the right of the State to secure the rendition of its fugitives.

Thus, to illustrate, if under the laws of New York a charge of felony could be prosecuted upon the sworn accusation contained in a complainant's affidavit without the intervention of an indictment, and in Pennsylvania such a charge could be prosecuted upon the filing of the unverified information of a prosecuting officer, while in New Jersey it could be prosecuted only by indictment, New York could extradite from New Jersey and Pennyslvania upon the basis of an affidavit; Pennsylvania could extradite from New York and New Jersey upon the basis of an unsworn information filed by a prosecuting officer, while when reciprocal demands came from New Jersey, New York and Pennsylvania would be compelled to refuse to surrender until New Jersey had presented an indictment. And when we remember that in most of the counties of the various States of the Union, Grand Juries meet from two to three times a year, it will be evident that such a situation would constitute a practical guarantee of immunity to the felon who could commit his crime in

New Jersey, if he could get beyond the boundaries of the State without being apprehended.

So much for the confusion which the Constitution itself, as construed by the learned counsel, would render inevitable. An additional element of confusion is injected into the situation by the terms of the statute, for that makes no provision for rendition upon the basis of an information, and, therefore, under the statute as it stands, those jurisdictions which have substituted that method of procedure for the indictment, since they are unable to procure rendition on the basis of the affidavit before a magistrate, are, according to the learned counsel, without *any* means of securing the rendition of their fugitive criminals.

All this would doubtless be a great convenience to the criminal classes and produce a great flow of criminals to the States which continued to prosecute by indictment, and in the end would doubtless compel all the States in self-defense to abandon so cumbersome a safe-guard, but it is somewhat difficult to perceive in what way it would make for that "more perfect union" or for "the establishment of" that "justice," or for the "securing of the blessings of liberty," in the interests of which the Constitution purports to have been adopted.

B.

THE LIMITATIONS SUGGESTED WOULD CREATE AN INVIDIOUS DISCRIMINATION IN FAVOR OF MAJOR CRIMINALS AS AGAINST MINOR ONES TO THE EXTENT OF INSURING TO THE MAJOR CRIMINAL A CHANCE OF ESCAPE WHICH WAS DENIED TO HIS LITTLE BROTHER IN CRIME.

If the Constitution had been framed, as much-harried prosecuting officers are sometimes, in moments of stress, tempted to suspect, for the protection of the criminal and the promotion of crime, the construction contended for by the learned counsel for the Relator would have at least this to commend it, namely, that it would then be consistent with the primary purpose of the instrument. For if such had been the object of the Constitution then it might well be argued, "the greater the criminal, the greater his rights," and that a construction of that instrument which conferred to the greater criminal marked advantages over the lesser was quite consistent with its general purposes.

That such would be the effect of the construction contended for is, of course, quite obvious. Even in the rare jurisdictions, where Grand Juries are continuously in session, the time required to procure an indictment is usually sufficient to give an escaped criminal a long start, while an affidavit setting forth the crime and containing in itself complete evidence of its commission can ordinarily be laid before a magistrate on the instant.

In by far the greater number of jurisdictions the minor crimes (misdemeanors), are prosecuted upon the basis of the complainant's affidavit, while the graver crimes are prosecuted only after and on the basis of the indictment.

It follows, therefore, upon the logic of the learned counsel, that the greater criminal is always to be given a longer handicap in the race between himself and justice than is to be accorded to the lesser lights in the criminal profession.

Of course it is no answer to this suggestion to suggest that the criminal may be apprehended at once and held to await the indictment, to be surrendered for rendition if it shall be forthcoming, and to be set free if it shall not be found, for the preliminary detention is merely an incident of the rendition and it is impossible to contend logically that there can be any right to hold preliminarily except upon a representation that there have been taken in the demanding State the judicial proceedings which warrant a demand for the rendition.

Were it otherwise a citizen of any State might be held in custody for months until the Grand Jury of some remote county of a demanding State had been convened and had taken action. And even if it could be held that such a course were permissible it is submitted that a construction which compels its adoption is not one that can consistently be urged in the interest of the liberty of the individual, nor is it such as will naturally commend itself on any other basis.

C.

THE LIMITATION SUGGESTED WOULD RENDER THE RENDITION OF A FUGITIVE FROM A SISTER STATE MORE DIFFICULT THAN AN EXTRADITION FROM A FOREIGN POWER.

Another of the interesting results which would flow if the contention of the learned counsel for the

Relator were to prevail is, that a constitution adopted in the interests of a more perfect union of the people and the States, will have resulted in making the several States, in one aspect, more completely foreign than are independent nations.

For, while fugitives from justice will be delivered up by and to foreign powers to and by the several States (through the intervention of the Federal Government), upon the basis of the proof of crime contained in affidavits taken before a magistrate, it will be impossible to secure their rendition from a sister State without producing evidence of the action of a Grand Jury; so that the State of Texas, for instance, will be in the anomalous position of being able to reclaim with ease those of its fugitives who escape to the Republic of Mexico, and of being compelled to sit idly by while those violators of the law who have taken refuge in Louisiana contrive to disappear and cover up their trails beyond the hope of successful pursuit.

D.

THE CONSTRUCTION CONTENDED FOR WOULD NOT SERVE AS A SAFEGUARD TO THE ACCUSED OR PREVENT UNWARRANTED EXTRADITIONS.

A somewhat elaborate argument *ab inconvenienti* is framed by the learned counsel for the Relator to establish that rendition between the States, if permitted on the basis of affidavits, may involve a form of oppression which will be obviated if the Constitution and statutes be so construed as to limit it to the instances where an indictment has been found. His suggestion is that after a rendition upon the basis of such papers the Grand

Jury *may* conclude not to indict, and the fugitive will thus have had his trip beyond the borders of his own State for nothing.

One answer to this is that even where the rendition is based on an indictment the prosecuting and the defendant's journey in that case will be equally barren.

A second answer is that we are content to send our citizens beyond the seas to take a like risk, and it would seem strange therefore that that consideration should operate against delivering him up within the Union.

A third answer is that, while in theory of law an indictment is doubtless a more solemn form of accusation and carries with it a greater sanction of the charge contained in it than flows from a magistrate's finding based upon the affidavits or depositions taken by him, yet as a matter of common knowledge and experience the magistrate's papers really furnish to the person demanded a greater safeguard than does an indictment. For the indictment found by a body of laymen on what to them seems probative, may be, and often is, founded upon that which falls absurdly short of legal proof, and yet upon its face it is subject to neither criticism nor attack, provided at least that it alleges properly the conclusions of fact to which the Grand Jury have arrived. While the papers taken before a magistrate must set forth the evidentiary facts in form sufficient to stand the test of legal analysis in the asylum State (People *ex rel.* Lawrence v. Brady, 56 N. Y., 182; State v. Swayse, 72 Mo., 399).

Furthermore, where there has been a rendition

on the basis of an indictment, the person surrendered ordinarily has no redress, even though the Grand Jury acted upon evidence ridiculously insufficient, while the institution of a wrongful proceeding before a magistrate for the purpose of procuring the arrest of the defendant in another jurisdiction and of haling him within the demanding State would, if it failed to result in an indictment and trial, ordinarily furnish him ample redress by means of an action of false imprisonment or malicious prosecution.

And it is doubtless the realization that, for the purposes of rendering up a criminal, the proceeding by affidavit furnishes the greater safeguard, that has led to the adoption of that form of procedure as the exclusive basis of international extradition.

And it is probably also the universal recognition that it is easier to challenge the sufficiency of proof by affidavit than to find any defect in an indictment, that has led to the common use of indictments by prosecuting officers as the final basis of interstate rendition, even in cases where the fugitive has first been held upon the basis of magistrate's papers, though, of course, renditions upon the basis of affidavits have not been uncommon.

In re Clark, 9 Wend. (N. Y.), 212.
Kingsbury's Case, 106 Mass., 223.
In re Burke, Fed. Cas. No. 2158.
Kurtz v. State, 22 Fla., 36.
In re Manchester, 5 Cal., 237.
In re White, 55 Fed. Rep., 54.
In re Keller, 36 Fed. Rep., 681.
State v. Richardson, 34 Minn., 115.
In re Hooper, 52 Wis., 699.

And the utter immateriality of the indictment or affidavit considered *as a pleading*, from the point of view of rendition proceedings, and their importance solely as *evidence of the existence of a basis for prosecution* is made conclusively clear by the fact that, once the rendition has been accomplished, it is not incumbent upon the demanding State to prosecute upon the basis of the charge as set forth in the indictment or affidavit upon which the rendition has been procured, and it *is* completely at liberty to indict anew for the same offense, or even to prosecute for an entirely new and different offense. (Lascelles v. Georgia, 148 U. S., 537.)

This consideration, we conceive, goes to the very foundation of the argument of the learned counsel and deprives it of all logical basis.

To sum up, therefore, it appears that to restrict the rendition to cases in which there is presented to the executive of the asylum State the pleading upon which the prisoner is to be tried leads to manifest absurdity in the law and tends to the promotion of crime, without furnishing to the person apprehended any safeguard against oppression which is not available to him where an affidavit is the basis of the demand.

POINT II.

There is no basis in the language of the Constitution for restricting the right of rendition to the cases in which the demand is accompanied by the criminal pleading upon which the defendant is to be tried and such restriction is at variance both with the contemporaneous construction and the history and origin of the provision.

The section of the Constitution (Art. IV., Section 2) is as follows:

> "A person *charged* in any State with treason, felony or other crime who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It is to be observed that the Constitution does not limit the obligation of the States to the cases of persons "indicted" or "informed against" or to persons "against whom charges have been laid in criminal *pleadings*." Nor does it in any other way undertake to prescribe the form in which the "charge" is to be made, or the evidence which shall be required before the demand shall be complied with.

That duty of definition and limitation was thus left to the Congress (Prigg v. Commonwealth, 16 Pet., 620; Kentucky v. Dennison, 24 How., at p. 104), which enacted in 1793 the act which in all

substantial particulars has been re-enacted as 5278 of the Revised Statutes, whereby it was provided:

> "Sect. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured * * *."

The constitutionality of this act in all its parts has never been seriously doubted, and has many times been clearly affirmed by this Court.

> Prigg v. Commonwealth, 16 Pet., 539, 622.
> *Ex Parte* Reggel, 114 U. S., 642.
> Roberts v. Reilly, 116 U. S., 80, 95.

And while there are no decisions flat-footed upon the question here sought to be raised, this arises, we submit, because no one has heretofore conceived such a construction possible rather than because there is any room for doubt upon the question.

Certainly the word "charged," in its ordinary acceptation, while doubtless sufficiently technical to exclude the idle gossip of the neighborhood or any informal accusation, is also sufficiently inclusive to embrace any formal accusation made before a judicial officer in the regular course of a criminal proceeding. And so this Court has said.

> Kentucky v. Dennison, 24 How. at p. 104.

Manifestly, it was thus that the Congress construed it in 1793, when Washington, the President of the Constitutional Convention, was President of the United States, and when many of the delegates to that Convention were members of the Congress that enacted the law; and concededly this construction is entitled to, and will be accorded the greatest weight.

> Prigg v. Commonwealth, 16 Peters, p. 621.
> Kentucky v. Dennison, 24 How., p. 104.

And this construction has been followed and sanctioned in practice from the early years to the present time without question as to its validity (see Moore on Extradition, Vol. II., §546, p. 871; Spear on Extradition, p. 266).

And manifestly this is the sense in which the word "charged" is commonly used in the law. To charge is "to accuse" (Bouvier's Law Dictionary). BLACKSTONE speaks of the person arrested in preliminary proceedings as being "charged" with crime; and describes how and when the person so "charged" is to be bound over by the committing magistrate to answer the "charge" prior to the filing of an indictment or information.

> "First, then, of an arrest; which is the apprehending of one's person, in order to be forthcoming to answer an alleged or suspected *crime*. To this arrest all persons whatsoever are equally liable in all criminal cases, but no man is to be arrested, unless *charged* with such a crime as will at least justify holding him to bail when taken" (Blackstone's Commentaries, Book IV., Chap. XXI). * * *
>
> "Sir Edward Coke, indeed, hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; and the contrary practice is by others

> held to be grounded rather upon connivance than the express rule of law; though now by long custom established. A doctrine which would, in most cases, give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combated it with invincible authority and strength of reason; maintaining, 1: That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*" (p. 997).

And again, speaking of the preliminary hearing and its results, he says:

> "If upon this inquiry it manifestly appears that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the *charge* against him" (p. 1001).

Speaking of the powers of a justice of the peace to issue a warrant, SIR MATTHEW HALE says:

> "And therein I say as followeth:
>
> 1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, *tho not yet indicted*."

(Italics ours throughout.)

Hale's Pleas of the Crown, 1st Am. Ed., Book 2, Chap. 12, p. 108.

Also it is observed that the constitutional provision has never heretofore been construed in any such spirit of narrowness or technicality as is involved in the contentions of the relator, for otherwise it could never have been held that a person became a "fugitive" merely by departing from a State in which he had committed a crime, though

his departure were unaccompanied by evidences of haste or evasion (*Ex parte Reggel*, 114 U. S., 642), or that the delivery up to the State "having jurisdiction of *the* crime," warranted a delivery up to that State for prosecution for any other crime, without even an attempt to prosecute for *the* crime upon which the extradition proceeding was founded (Lascelles v. Georgia, 148 U. S., 537).

Moreover, any construction other than that thus given by the statute would be manifestly at variance with the whole purpose and spirit of the Constitution, namely, to create a more perfect union, and to weld into a nation what had been theretofore a more or less loosely-bound confederation of independent States. Manifestly, so far as the enforcement of the criminal laws was concerned, there could be no real nationality, if any right of asylum in the various States could be accorded to the criminals of other States, and unless provision were made for the *immediate* apprehension anywhere within the Union of those criminals who had fled beyond the borders of the jurisdiction where their crime had been committed.

To quote from Kentucky v. Dennison (*supra*):

> "For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against

> the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offense as soon as another opportunity offered" (p. 100).

Moreover, as is also pointed out by the same authority, interstate rendition was no new thing. There had been inter-colonial rendition by treaty between the New England Colonies as early as 1643. Whereby, "upon the escape of any prisoner or *fugitive for any criminal cause*, whether by breaking prison or getting away from the officer, *or otherwise escaping*," the fugitive should be rendered to the jurisdiction from which he had fled and whereby the basis of the rendition was "the certificates of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner *as such offender* at the time of the escape."

And a similar practice obtained among the other colonies, even in the absence of express provision of law, the basis of the rendition being the certificate of a judicial officer.

> Kentucky v. Dennison, 24 How., pp. 100, 101.
>
> XIII. Am. Law Rev., at p. 188 *et seq.*
>
> Moore on Extradition, Vol. II., Sec. 518.

The practice was continued under the "Articles of Confederation which limited the *obligation* to surrender to cases of treason, felony and *high misdemeanors*," and required the demand of the executive of the pursuing State (Art. 4, subd. 2), and concurrently with the rendition under that provision it was not unusual to surrender fugitives under the old methods without requiring the intervention of the executive.

Moore on Extradition, Vol. II., Sec. 519.
XIII. Am. Law Rev., at pp. 189 and 190.

To assert, therefore, that by the Constitution it was provided that these old customs should be abolished and that fugitives should no longer be surrendered upon the evidence of a preliminary proceeding and until there had been given to the asylum State that assurance of good faith involved in the formulation of the pleading upon which the accused is to be put to his trial, is to give the lie to the solemn announcement of the preamble that the Constitution was adopted "to form a more perfect union."

To sum up under this head, therefore, it is submitted,

First: That the language of the Constitution does not require and, indeed, does not permit the construction for which the Relator contends.

Second: That such a construction is inconsistent with its general purposes.

Third: That such a construction is at variance with a contemporaneous construction ever since adhered to, and

Fourth: That it is at variance with the history, origin and evolution of the provision.

POINT III.

Even if the Relator's contention were sound it would establish merely a limitation upon the right of the Federal Government to compel rendition. There is no such limitation upon the right of the State voluntarily to accord it, and the detention of the Relator under State process does not involve the invasion of any right protected by the Federal constitution.

Finally, we submit, even if the learned counsel for the Relator were right, in his interpretation of the constitution and the statute, he would have no standing in this court.

His complaint is not that any right under the constitution or the laws of the United States has been denied him; not that the State of New York has refused to perform the obligations imposed upon it by the fundamental law of the land, but that it is performing *more than its obligations* and causing his surrender when neither the constitution nor the statutes of the United States *require it* to do so.

This, we maintain, the State of New York has a perfect right to do.

That the several States had, at the inception of the government, and except in so far as they may be held to have surrendered it to the general government, still have the right to deliver up fugitives from justice, at will, is clear upon principle, and settled both by practice and authority. For neither the Federal Constitution nor the Federal statutes

provide any means for the detention of fugitives pending the completion of the rendition proceedings, and such preliminary detention must be, and universally has been, founded upon the sovereign power of the State to deliver up foreign criminals that may come within its jurisdiction—a power based both upon the *quasi* international relations between the States, and upon the right of each sovereignty to protect itself against the dangers incident to harboring criminals.

As was said in *Commonwealth v. Wilson*, 1 Phila., 80:

> "We do not agree to the position assumed that the oath must be made under the Act of Congress. When so made and properly certified, or when an indictment is found in another State and properly authenticated, we consider it conclusive, and we have no right to inquire behind it. But where fugitives are pursued, * * *.
>
> "It is not so much a matter of comity as a police regulation of our own to get rid of dangerous delinquents. We do not sustain the proceedings for the benefit of the State whose laws he violated alone, but for our own safety. We are well aware that the legislation of Congress is exclusive in many cases and if the rights of Virginia alone were concerned she could not urge us to do more than carry into effect the Congressional provision. But every State has a right to protect its own citizens from the felons of other States. And if we chose to permit our magistrates to exercise such jurisdiction on an oath made under our own laws the fugitive charged with felony cannot lawfully complain."

That this power still resides in the States with respect to interstate surrender* seems equally clear.

*Of course as to *international* extradition, the general theory of our Government, which reposes all power of dealing with independent sovereignties in the Federal Government, would imply a surrender of the right of the State.

The provision of the Constitution neither by express language nor by necessary or fair implication vests the power of delivering up criminals from one State to another *exclusively* in the Federal Government.

Undoubtedly so far as the Congress has legislated upon the subject, its enactment is the supreme law of the land, and no State laws which *conflict* with that enactment can have any validity.

But the national legislation has not, and does not purport to have covered the entire field. State legislation in aid thereof, has been adopted in almost all, if not in all of the States of the Union, and the validity of such legislation has never been questioned.

And the right of a State to enact legislation upon a subject as to which the jurisdiction is concurrent where such legislation is consistent with that of the Federal Government and merely relates to matter not completely embraced in the Federal enactment, is settled upon general principles.

Reid v. Colorado, 187 U. S., at p. 147.

Indeed, were it not for State action there could be no effective interstate rendition, since the Federal statutes make no provision for preliminary detention and since the constitutional provision requiring the surrender is not self-operative, and the Federal legislation in furtherance thereof imposes only a moral obligation unenforceable either by the Federal or State Governments.

Kentucky v. Dennison, 24 How., pp. 109, 110.

That this power to surrender fugitives from one State to another has been reserved by the States seems, therefore, clear upon principle. And it has

in its support the opinions of judges of high authority.

State v. Anderson, 1 Hill Law R. (South Carolina), 348, 349.
Matter of Fetter, 23 N. J. Law, 315, 316.
Com. v. Wilson, 1 Phila., 80.
State v. Hall, 115 N. C., at p. 818, 824.

In *State v. Anderson*, decided by the Supreme Court of South Carolina in 1833, 1 Hill Law, 348, Judge JOHNSON, writing for the Court, said:

> "I have thus shown that it is not only lawful, but the duty of one sovereign, independent State, to arrest and deliver up the fugitives from justice from another, * * *
>
> "A question has been raised whether the Constitution of the United States and the Act of Congress of 1793 have not, as between the co-States, superceded and abrogated the laws of nations; and whether a fugitive from justice from one State can be lawfully arrested in another without demand having been first made by the executive of the State in which he has fled, upon the executive of the State in which he is found. * * *
>
> "In the consideration of this question, it is not my purpose to enter into the exciting and much contested political question, as to the nature, objects, and extent of the relative obligations, which the Constitution imposes on the several States, composing the Union. For the purpose of this case it is wholly immaterial whether they are regarded as entirely sovereign and independent, or consolidated into one government, or as occupying any point between these extremes; provided the obligations which their bond of union imposes, do not enjoin upon them to do each other all the evil they can. If they stand in the relation of sovereign and independent States, then the laws of nations apply and justify the arrest,

and must prevail, unless controlled by the provisions of the Constitution.

"Whether we regard the causes which gave rise to the Federal Constitution, its general tenor and import, its particular provisions, it is obvious, that whatever may have been the relation existing between the States before, it never was intended to separate them more widely than they would have been, as independent States. On the contrary, its whole history shows that its object was, in the language of the preamble, 'to form a more perfect union, establish justice, &c.'

"Between independent nations war, the *ultima ratio*, is the usual means of enforcing the obligations of the laws of nations; and we have before seen, that harboring fugitives from justice is just cause of complaint by one nation or government against another. It was necessary to guard against this evil, and in this spirit the provision of the Constitution before referred to, and the Act of Congress of 1793, were doubtless framed—not with the intention of abrogating the laws of nations, but in this respect, and to this extent, to make them imperative on the States, and to supercede the necessity of resorting to the sword.

"In most cases the States are separated from each other by an imaginary line, and if passing one of these the traitor or felon should find a sanctuary where no hand dare touch him which was not armed with executive authority, an age spent in pursuit can scarcely be regarded as a time, within which it could reasonably be expected an offender could be brought to justice. There is certainly no express provision in the Constitution, which renders this formula imperative; nor could it ever have been intended by the framers of that instrument, to confer such an immunity on offenders against public justice."

In discussing the same question it was said by

the highest court of New Jersey, in Matter of Fetter (23 N. J. L., 315, 316):

> "In considering this question it is material to observe that this clause of the Constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right. It makes *obligatory* upon every member of the confederacy the performance of an act which previously was of doubtful obligation. All writers upon the law of nations agree that it is the right of every sovereign State to expel from its territory or to surrender to another nation in amity with it, an offender against the laws of such foreign nation. No State is bound to harbor criminals within its bosom, but may, at its option, surrender them to the government against whose laws they have offended. * * *
>
> "But whatever difference of opinion may exist in regard to the obligation resting upon one nation to surrender a fugitive from justice upon the demand of another nation in amity with it, there is no denial and no question of the right of every sovereign nation to surrender fugitives within its territory. The whole effect of the Constitution was to confer upon each member of the confederacy the *right to demand* from every other member of the confederacy, a fugitive and to make *obligatory* the surrender which was before discretionary."
>
> Matter of Wm. Fetter, 23 N. J. L., 315, 316.

And recently, and even more emphatically the highest Court of North Carolina has enunciated the same doctrine:

> "*In the exercise of its reserved sovereign powers* the State may, as an act of comity to a sister State, provide for the surrender upon requisition of a person, who like the prisoners, are indictable for murder in another State, *though they have never fled from justice.*"
> (Italics ours.)

State v. Hall, 115 N. C., 818, and see same doctrine in dissenting opinion, at p. 824.

Moreover, there is high authority for the statement that this theory of the power of interstate rendition in excess of the Federal requirement, prevailed and was generally honored in the observance during the first fifty years of our natianal life. Mr. Justice CATRON in the opinion filed by him in Holmes v. Jennison, says:

> "The Constitution equally cuts off the power of the States to agree with each other, as with a foreign power, yet, it is notoriously true, that for the fifty years of our existence under the Constitution, the States have, in virtue of their own statutes, apprehended fugitives from justice from other States, and delivered them to the officers of the State where the offense was committed; and this, independently of the Fourth Article and Second Section of the Constitution, and the Act of Congress of 1793, Ch. 51, which provides for a surrender on the demand of the executive of one State upon that of another. The uniform opinion heretofore has been, that the States on the formation of the Constitution, had the power of arrest and surrender in such cases; and that so far from taking it away, the Constitution had provided for its exercise, contrary to the will of a State, in case of an unjust refusal; thereby settling, as amongst the States, the contested question, whether on a demand, the obligation to surrender was perfect and imperative, or whether it rested on comity, and was discretionary."
>
> 14 Pet., 597.

It seems clear, therefore, that the States have complete power over the subject of interstate rendition, so long as they pass no law and authorize no act restrictive of the rights conferred, and duties imposed, by the Federal Constitution.

So that if the State of New York were to enact a law whereby it was provided that a peace officer of another State armed with a warrant issuing out of the Courts of that other State, might execute his warrant within the State of New York and transport his prisoner to the State in which the crime was charged, there would be no conflict between that legislation and the Federal Constitution.

We are aware that there are expressions in various of the decisions which would seem at first blush to be at variance with these conclusions, but an examination of the authorities will show that in every case that which was under consideration was the *obligation* of the State under the Federal Statute;* and that the opinions proceeded on the theory that there was in each case no State law applicable to the subject; and it will appear further that the right of the State is to legislate upon the subject is one upon which opinion has been expressly reserved by this Court (see Lascelles v. Georgia, 148 U. S., at p. 545).

If this be recognized as sound there can be only two grounds of Federal jurisdiction over the legality of an arrest in extradition

First: If the arrest is made and the warrant is

*Such, for instance, was the recent case of Hyatt vs. Corkran, 188 U. S., 691, where this Court reviewed the action of the State Courts in releasing a prisoner held by virtue of an extradition warrant issued by the Governor of New York. Of course the Governor, in issuing the warrant, was entitled to fall back upon the authority derived from the Federal statute; in so far as he was authorized by the Federal statute to issue it he was entitled to the protection of the Federal Government, and the action of the State Court which nullified his acts obviously called in question a power derived from and exercised under the Constitution and statutes of the United States, and was thus subject to review. If the determination of the State Courts had been the reverse, and they had held that, under the State laws, the warrant was properly issued, we conceive that there would have been no ground of review.

issued *solely* upon the authority of the Federal legislation; *Second:* If the arrest constitutes an invasion by the State or its officers of the privileges and immunities of the Federal citizenship, a failure to accord to a citizen of another State the rights and privileges of the citizen of the State, or an invasion of liberty without due process of law.

But clearly neither of these grounds of jurisdiction exists where the arrest is made for the purposes of an orderly criminal proceeding, no matter where within the Union such proceeding is to be had, and is made pursuant to a law of the State, and is not the mere arbitrary act of the executive authorities.

For where there is a law of the State conferring upon the Governor the authority and imposing upon him the duty to cause to be arrested and delivered, a fugitive from another State, he must clearly be held to be acting under that law which creates and imposes a perfect obligation, rather than under the Federal statutes, which are merely declarative of a moral obligation of the State, the performance of which is imposed upon no individual.

It follows, therefore, that where there is such State legislation, since the detention is in pursuance thereof, there can be no ground of Federal jurisdiction upon the theory that the construction of the statutes or Constitution of the United States is involved.

It follows also that where there is such State legislation the other possible grounds of Federal jurisdiction are also eliminated.

It is not one of the privileges or immunities of a citizen of the United States to be arrested in any particular manner or by any particular officer, or to be exempt from arrest at any particular place.

Mahon v. Justice, 127 U. S., 700.
Lascelles v. Georgia, 148 U. S., 537, 543, 544.

There can be no denial to the citizens of a sister State of the privileges of citizenship in the State by a system of laws which applies to each and all alike.

Paul vs. Virginia, 75 U. S. (8 Wall), 168, 180.
Slaughter House Cases, 83 U.S.(16 Wall), 36, 37.
Cole v. Cunningham, 133 U. S., 107, 113, 114.
Blake vs. McClung, 172 U. S., 239, 252.

And there is no denial of due process of law where the arrest is made in pursuance of an orderly system of statutory regulations for the purpose of subjecting the individual to an orderly trial under any of the forms known to and sanctioned by the common law, or under any other form of procedure which does not involve a denial of fundamental rights.

Hurtado v. California, 110 U. S., 516, 537.
Maxwell v. Dow, 176 U. S., 581.
Brown v. New Jersey, 175 U. S., 172, 174.
Reetz v. Michigan, 188 U. S., 505.
West v. Louisiana, 194 U. S., 258, 261.

Indeed, it may well be doubted whether any form of arrest or detention concededly preliminary to and in furtherance of a legal inquiry will constitute a denial of due process of law, or at all events, a denial such as will call for the intervention of the Federal Courts in the first instance.

Cook v. Hart, 146 U. S., 189, p. 194.
Lascelles v. Georgia, 148 U. S., 537.

Mahon v. Justice, 127 U. S., 700.
Ker v. Illinois, 119 U. S., 436.

It remains, therefore, only to consider whether there is authority in the New York statutes for the arrest and delivery of the defendant.

Such authority is to be found in Section 827 of the Code of Criminal Procedure, which provides a complete machinery for rendition, and which has been held of itself to impose a duty upon the Governor (Matter of Scrafford, 59 Hun, (N. Y.), at p. 327).

That section reads as follows:

> Sec. 827. To be delivered up by the Governor, on demand, *et cetera.*
>
> *It shall be the duty of the Governor*, in all cases where by virtue of a requisition made upon him by the Governor of another State or Territory, any citizen, inhabitant or temporary resident of this State is to be arrested, as a fugitive from justice, provided that said requisition be accompanied by a duly certified copy of the indictment or information* from the authorities of such other State or Territory, charging such person with treason, felony or crime in such State or Territory, to issue and transmit a warrant for such purpose to the sheriff of the proper county or his undersheriff, or in the cities of this State (except in the City and County of New York, where such warrant shall only be issued to the superintendent or any inspector of police), to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction, shall be competent

*The sense in which "information" is used, *i. e.*, as equivalent to preliminary accusing affidavit before a magistrate, will be seen by a comparison with Section 145 of the same Code, which reads as follows: "The information is the allegation "made to a magistrate that a person has been guilty of some "designated crime."

to make service of or execute the same. The Governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and intrusted the execution of the Governor's warrant must, within thirty days from its date, unless sooner requested, return the same and make return to the Governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this State, or of any city, county, town or village thereof, must, upon request of the Governor, furnish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

2. Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the Governor of this State, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the Supreme Court, or a county judge, who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the Governor thereon, he or they may have a writ of *habeas corpus* upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said Court or a judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the Governor, and one of the judges aforesaid, or a counselor-at-law of this State, and such waiver shall be immediately for-

warded to the Governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against and mentioned in the requisition, the accompanying papers and the warrant issued by the Governor thereon, then the Court or Judge shall order and direct the officer intrusted with the execution of said warrant of the Governor, to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant issued thereon, as the agent or agents upon the part of such State to receive him or them; otherwise to be discharged from custody by the Court or Judge.

If upon such hearing the warrant of the Governor shall appear to be defective or improperly executed, it shall be by the Court or Judge returned to the Governor, together with a statement of the defect or defects, for the purpose of being corrected and returned to the Court or Judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

3. It shall not be lawful for any person, agent or officer to take any person or persons out of this State, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings aforedescribed, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this State, for the purpose of taking him or sending him to another State, without a requisition first duly had and obtained, and without a warrant duly issued by the Governor of this State, served by some officer as in this section provided, and

without, except in case of waiver in writing as aforesaid, taking him before a Court or Judge as aforesaid, unless in pursuance to the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats or undue influence, persuade any citizen, inhabitant or temporary resident of this State to sign the waiver of his right to go before a Court or Judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction, be sentenced to imprisonment in a State prison or penitentiary for the term of one year. Any willful violation of this Act by any of the above-named officers shall be deemed a misdemeanor in office."

Now, the Courts of New York have uniformly recognized the practice of rendition upon the basis of affidavits, and since this is true, it follows, if we are sound in our previous contention, that this Court will accede to the propriety of that construction, even though it would construe differently a Federal statute in identical terms.

In re Kemmler, 136 U. S., 436, 449.
McNulty v. California, 149 U. S., at p. 647.
West v. Louisiana, 194 U. S., 258, 261.

It follows, therefore, that the case does not present a question of Federal cognizance, and that the appeal should be dismissed.

To sum up under this head, therefore, our argument is as follows:

1. The States have as an attribute of sovereignty the right to surrender fugitive criminals under such conditions as to each State may seem best.

2. By the Constitution they have limited the right to *refuse* rendition, but have imposed no limitation on the right to *grant* it.

3. Where a State official has no warrant in State law for the issuance of a rendition warrant he may, perhaps, be presumed to be acting under the authority of the Federal statute and of that statute alone, and under such circumstances his power to act may, perhaps, be limited by the terms of the Federal statute, and an attempt to act in excess of such authority may be subject to restraint by the Federal Courts.

4. But where a State official derives authority from the laws of his State to issue an extradition warrant, the legality of his action in issuing the warrant is dependent solely upon its conformity with such laws; the question is to be determined solely by the State courts, and affords no ground of Federal jurisdiction.

IN CONCLUSION.

It is respectfully submitted, therefore, that the first question certified should be answered in the affirmative, and the second in the negative, and that the case should be remitted to the court below with instructions to dismiss the writ for lack of jurisdiction and to remand the prisoner to the detention from which he was taken.

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